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ALEXANDER L. STEVAS
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1984

Alan H. Schafer,

Petitioner,

v.

The United States of America

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 35(b) establishes only a deadline for filing a motion or additionally establishes a requirement that the court dispose of the motion within 120 days?

2. Whether or not a district court judge delays unreasonably and thereby loses jurisdiction to consider a motion for reduction of sentence under Federal Rule of Criminal Procedure 35(b) when he delays his decision pending an administrative appeal to the United States Parole Commission?

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OPINIONS BELOW

The opinion of the Court of Appeals which reversed the district court's reduction of petitioner's sentence is to be published and appears in Appendix A hereto. The Order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc is unreported and appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 26, 1984. A timely Petition for Rehearing and suggestion for rehearing en banc was denied on March 5, 1984, and this petition for certiorari was filed within 60 days of that date. This Court's

jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 35(b), Federal Rules of Criminal Procedure provides:

> Reduction of Sentence. The court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

STATEMENT OF THE CASE

Petitioner pled guilty on October 12, 1981, to one count of conspiracy to commit

mail fraud (18 U.S.C. § 371) and two counts of mail fraud (18 U.S.C. § 1341). He was sentenced on November 24, 1981, to pay a $12,000 fine and to serve a term of forty-two months imprisonment. The other 14 counts of the indictment, including an obstruction of justice charge, were dismissed. Petitioner paid the fines on December 8, 1981 and commenced service of his sentence on December 14, 1981.

On February 19, 1982, the United States Parole Commission issued its Notice of Action establishing petitioner's presumptive parole date. The Notice of Action stated that although under the commission's guidelines a defendant convicted of the same offenses and having the same salient factor score would be eligible for parole in ten to fourteen months, his presumptive parole date was

set for eighteen months because of the severity of his offense which included obstruction of justice.

Petitioner filed a Rule 35(b) Motion for Reduction of Sentence on March 19, 1982, within 120 days after imposition of sentence. That motion was based upon the parole commission's action, the effect of incarceration on his mental health and physical health, and his age. The district court held a hearing on the motion for reduction on May 24, 1982, at which time the district court stated that it would delay ruling on the motion until petitioner's administrative appeal was finally determined by the parole commission. The United States registered no objection to the court's delay for this reason. On October 22, 1982, the district court issued its order reducing

petitioner's sentence to time served on December 14, 1982.

The United States argued on appeal that the district court's decision to delay ruling on the motion pending a final decision from the parole commission was an unreasonable ground for delay and the district court therefore lost jurisdiction to rule on the motion. The Fourth Circuit agreed with the United States, reversed, and remanded for reinstatement of petitioner's original sentence.

Petitioner filed a timely Petition for Rehearing pursuant to Rule 40, Federal Rules of Appellate Procedure and a suggestion for a rehearing en banc pursuant to Rule 35 of those rules. The petition urged the court to reconsider its decision on the ground that it was contrary to a prior decision of that

court. The petition was denied, without elaboration, on March 5, 1984..

REASONS FOR GRANTING THE PETITION

The decision of the Fourth Circuit in this case is directly contrary to a decision of the Eighth Circuit Court of Appeals in United States v. DeMier, 671 F.2d 1200 (8th Cir. 1982), on precisely the same issue. Further, whether Rule 35(b) establishes a deadline for filing a motion for reduction, a deadline for the district court to rule on such a motion, or neither one, is an important question of federal law upon which the courts of appeal disagree and which should be settled by this Court.

Rule 35(b) provides that the court may reduce a sentence within 120 after its imposition. This Court stated in dictum

in United States v. Addonizio, 442 U.S. 178, 189 (1979), citing Federal Rule of Criminal Procedure 45, that the time period is jurisdictional and may not be extended. Nevertheless, the courts of appeal for the Third, Fourth, Fifth, Eighth, and Ninth Circuits have concluded that the district courts retain jurisdiction of a motion filed within 120 days for a "reasonable time" after the 120 days expires.[1]

1. This case involves a conflict among the circuits about what constitutes

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[1] E.g., United States v. DeMier, 671 F.2d 1200 (8th Cir. 1982); United States v. Mendoza, 581 F.2d 89 (5th Cir. 1978) (en banc); United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975); United States v. United States District Court, 509 F.2d 1352 (9th Cir. 1975); United States v. Janiec, 505 F.2d 983 (3d Cir. 1974), cert. denied, 420 U.S. 948 (1975).

a reasonable ground for delay beyond the 120 days. In United States v. DeMier, 671 F.2d 1200, the Eighth Circuit determined that a district court's delay in ruling on a Rule 35(b) motion until the parole commission rendered a final decision on an administrative appeal was not an unreasonable delay that deprived the court of jurisdiction over the motion. The Fourth Circuit, in this case, concluded that it was unreasonable for a district court to delay ruling on a Rule 35(b) motion pending action by the parole commission and therefore the district court lacked jurisdiction when it issued its order reducing petitioner's sentence. The Seventh Circuit has also decided this issue contrary to the Eighth Circuit. United States v. Kajevic, 711 F.2d 769

(7th Cir. 1983). This conflict among the circuits should be resolved by this Court.

2. This Court stated in Addonizio that the 120 days was jurisdictional and could not be extended. Because of the interpretation of this statement and of the rule by the courts of appeal, an important question of federal law exists which should be settled by this court. If the rule establishes a deadline for the court to act,[2] the courts of appeal are clearly permitting district courts to exceed their jurisdiction in ruling on such motions. If the rule establishes

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[2]On the basis of Addonizio, the Seventh Circuit in United States v. Kajevic, 711 F.2d 769 (1983) and the District of Columbia Circuit Court in United States v. Pollack, 655 F.2d 243 (1980), have opined, but avoided holding, that Rule 35(b) limits a district court's power to act to 120 days after sentencing.

only a filing deadline,[3] then petitioner's motion was timely and, contrary to the Fourth Circuit's conclusion, the district court did have jurisdiction to rule on the motion.

The Courts of Appeal have rejected both of these interpretations, and instead concluded that a district court retains jurisdiction for some indefinite period of

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[3]The Eighth Circuit in United States v. Williams, 573 F.2d 527 (1980), and the Ninth Circuit in Leyvas v. United States, 371 F.2d 714 (1967), treated the 120 days as a filing deadline. This interpretation is consistent with the history of Rule 35(b). The 120 days was substituted for the prior requirement that such motions be filed before expiration of the term of court. F. R. Crim. Proc. 35, Advisory Committee Note, 1946. The term of court rule was a limitation on filing, not on the court's power to rule. E.g., United States v. Mayer, 235 U.S. 55, 67 (1914); United States v. Pile, 130 U.S. 280, 283 (1889); Phillips v. Negley, 117 U.S. 665, 673 (1886).

time beyond the 120 days, which expires without notice to a defendant and for reasons beyond his control. If the time limit was a limit on subject matter jurisdiction, such an extension of jurisdiction would not be possible.

Petitioner filed his motion within 120 days and did everything he could to obtain a timely ruling thereon from the district court. The Fourth Circuit's holding that the district court lost jurisdiction over his motion at some point in time unpredictable by petitioner and his attorneys is contrary to logic and inconsistent with the history of Rule 35(b). Further, the decision unfairly penalizes petitioner for the district court's delay in ruling on his motion, a delay in which the government acquiesced.

CONCLUSION

The petition for certiorari should be granted to resolve the conflict between the courts of appeal and to settle the important question about the time limit in Federal Rule of Criminal Procedure 35(b).

Respectfully submitted.

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CERTIFICATE OF SERVICE

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April 11, 1984

APPENDIX A

United States v. Schafer, No. 83-6119 (4th Cir. January 26, 1984). [Caption omitted.]

HALL, Circuit Judge:

The United States appeals from a district court order reducing Alan H. Schafer's sentence from imprisonment of three years and six months to one year. We conclude that the district court was without jurisdiction to enter this order. We, therefore, vacate the order and remand the case with instructions to reinstate the original sentence.

I.

In June, 1980, Schafer was charged in a seventeen count indictment for bribing voters and submitting false and fraudulent absentee ballots through the mails during

an election in Dillon County, South Carolina. Schafer pleaded guilty to one count of conspiracy under 18 U.S.C. § 371, and two counts of mail fraud, under 18 U.S.C. § 1341. The remaining counts were dismissed.

On November 24, 1981, the district court fined Schafer $12,000 and sentenced him to three years and six months imprisonment. Schafer began serving his sentence on December 14, 1981. Later, on February 19, 1982, the United States Parole Commission issued a notice that Schafer would be required to serve eighteen months before he would be eligible for parole. Although Schafer's parole date could have been set as early as ten months, the Commission was swayed by his leadership role in the offense.

One hundred fifteen days after sentencing, on March 19, 1982, Schafer moved for reduction of sentence pursuant to Fed. R. Crim. P 35(b). On April 28, after the 120-day limit in which the court may act on such a motion had expired, the court scheduled a hearing for May 14, 1982, and asked counsel to consider whether it was "appropriate for the Court to [reduce a sentence] merely because it may disagree with the Parole Commission's ruling on the presumptive parole date." The Government filed a response to Schafer's motion, arguing that "actions taken by the U.S. Parole Commission, which may not be in accord with the trial judge's expectations at the time of sentencing, do not provide a basis for collateral attack." At the hearing, the court abstained from ruling on Schafer's

motion because of his "pending...appeal... from a presumptive parole date decision." The Parole Commission affirmed its presumptive parole decision of eighteen months on August 3, 1982.

The district court then entered an order reducing Schafer's sentence to one year. As a consequence of the court's order, Schafer was relieved from serving the six months remaining until his parole date. The court found that its delay in ruling on Schafer's motion was "reasonable" because a sentence reduction was needed to correct an "obvious unjust practice of the Parole Commission."[1] This appeal by the Government followed.

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[1]Schafer suggests that the Parole Commission's brief reference to a dismissed obstruction of justice charge

(Footnote Continued)

II.

On appeal, the Government contends that the district court lost jurisdiction over the motion at issue when it delayed consideration of the motion until after the 120-day deadline in order to review the Parole Commission's decision. Additionally, the Government argues that the appropriate remedy in this case is to order reinstatement of the district court's original sentence. We agree with both of the Government's contentions.

Rule 35(b) states, in pertinent part, that "[t]he court may reduce a sentence

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(Footnote Continued)
was the reason the Commission extended his parole date. The Commission only mentioned this charge, however, in the context of stressing Schafer's leadership role in the offense. Thus, the charge is not relevant to our consideration of the case.

within 120 days after the sentence is imposed,..." On its face the rule limits the time within which the trial court has power to act, however, this circuit and other circuits that have considered the issue have not applied the rule in a mechanical fashion. United States v. Kajevic, 711 F.2d 767 (7th Cir. 1983); United States v. Krohn, 700 F.2d 1033 (5th Cir. 1983); United States v. Stollings, 516 F.2d 1287 (4th Cir. 1975).

In Stollings, the Fourth Circuit recognized that it is sometimes impractical for a judge to act within the 120-day period. In that case, upon missing the Rule 35(b) deadline by three days, the trial judge declined to rule on the defendant's motion because he believed he had lost jurisdiction. On appeal, this Court held that where delay is based upon

reasonable grounds, a district judge may properly retain jurisdiction over a timely filed motion for reduction of sentence.

In Stollings, however, Judge Haynsworth specifically warned that the time limitation of Rule 35(b) has "as its dual purpose the protection of the district court from continuing and successive importunities and to assure that the district court's power to reduce a sentence will not be misused as a substitute for the consideration of parole by the Parole Board." 516 F.2d at 1289. Likewise, in United States v. Mendoza, 565 F.2d 1285 (5th Cir. 1978), the Fifth Circuit noted that limiting the retention of Rule 35 jurisdiction to a reasonable time "should prevent the possibility, however remote, of a district court usurping the function of the Parole

Board...." Id. at 1291. Most recently, in United States v. Kajevic, 711 F.2d at 767, the Seventh Circuit held that "[w]hen a district judge delays action on a Rule 35(b) motion till long after the expiration of the 120 days, for the purpose or with the likely effect of assuming the function of the parole authorities, his delay is unreasonable." Id. 772. See also United States v. Krohn, 700 F.2d at 1033 (holding district court's ten-month delay in reducing defendant's sentence was reasonable because court did not deliberately or effectively intervene in matters committed to authority or [sic] Parole Commission).

In this case, the trial judge purposely delayed consideration of the motion before him until seven months after the deadline in order to review the Parole

Commission's decision. As the trial judge conceded in the order reducing Schafer's sentence, the ultimate reason for the delay was that he disagreed with the Parole Commission's decision. Under these circumstances, we can only conclude that the delay was unreasonable and the court was without jurisdiction.

Lastly, the Government argues that the appropriate remedy in this case is to order reinstatement of the district court's original sentence. We agree. The trial judge was without jurisdiction to reduce Schafer's sentence. We, therefore, hold that reinstatement of the original sentence is an appropriate remedy.

III.

For the foregoing reasons, the judgment of the district court is vacated, and this case is remanded for

reinstatement of the district court's original sentence.

REVERSED AND REMANDED
WITH INSTRUCTIONS

APPENDIX B

United States v. Schafer, No. 83-6119 (4th Cir. March 5, 1984). [Caption omitted]

Upon consideration of appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Widener, Judge Hall, and Judge Sprouse.

For the Court,

/s/ William K. Slate, II
Clerk